

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KING RAMONO RA PHAROL
BEAUJAYAM,

No. C-11-3479 EMC

Appellant,

v.

**ORDER RE MOTION TO DISMISS
APPEAL**

JOHN G. STUMPF,

(Docket No. 3)

Appellee.

Appellee John Stumpf has filed a motion to dismiss the appeal of King Ramono RA Pharol Beaujayam from the Bankruptcy Court's dismissal of an involuntary Chapter 7 bankruptcy petition. Docket No. 3. Appellant filed a late opposition to Stumpf's motion to dismiss. Docket No. 6.

In Appellant's opposition, he challenges the impartiality of this Court and requests that the Court disclose "all financial and other conflicts of interest prior to proceeding in this case." Opp. at 1. Construing this request as an affidavit of bias or prejudice and request for recusal pursuant to 28 U.S.C. § 144, the Court has authority under that section and Civil Local Rule 3-15 to screen such requests in order to determine whether they are timely and legally sufficient. In the instant case, the Court determines that Appellant's affidavit is insufficient as it provides no allegations that would qualify as circumstances warranting disqualification under 28 U.S.C. § 455(a) or (b). This Court has no financial interest in the subject matter or parties to the proceeding within the meaning of § 455(d)(2). To the extent that Appellant requests that this Court recuse itself from the proceedings, the request is denied.

1 Upon review of the merits of this matter, it is apparent that, without further order from the
2 Bankruptcy court, this Court does not currently have jurisdiction to hear this appeal. Appellant's
3 notice of appeal is untimely, as it was filed thirty days after the first notice of appeal in this action.
4 Under Fed. R. Bankr. P. 8002(a), "The notice of appeal shall be filed with the clerk within 14 days
5 of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal
6 is filed by a party, any other party may file a notice of appeal within 14 days of the date on which
7 the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever
8 period last expires."

9 In this case, the Bankruptcy Court filed its order granting the motion to dismiss the petition
10 on May 25, 2011. *See* Docket No. 1. Under 8002, Appellant had until June 8 to file his notice of
11 appeal or, if another party to the case timely filed an appeal by that date, he had up to 14 days after
12 that appeal was filed to file his own appeal. Here, the first timely notice of appeal was filed on June
13 7, 2011, by another party, Mr. Stewart. *See William-Bullock III Stewart v. John G. Stumpf*, Case No.
14 11-3386 EMC, Docket No. 1. Appellant was therefore required to file his notice of appeal no later
15 than June 21 (14 days after the filing of the first timely notice of appeal by Mr. Stewart). However,
16 Appellant did not file his notice of appeal until July 7, 2011.¹ Docket No. 1.²

17 "[T]he failure to timely file a notice of appeal is a jurisdictional defect barring appellate
18 review." *In re Wiersma*, 483 F.3d 933, 938 (9th Cir. 2007) (quotation omitted); *see also In re*
19 *Delaney*, 29 F.3d 516, 518 (9th Cir. 1994) ("Although rule 8002 ... incorporates some flexibility, we
20 strictly enforce its time provisions.") (quoting *In re Slimick*, 928 F.2d 304, 306 (9th Cir. 1990)).
21 Appellant appears to argue that because his notice was filed 14 days after that of Dante De Torres, it
22 is timely. *See* Opp. at 11. However, Rule 8002 only provides for *one* 14-day extension beyond the
23

24 ¹ Even crediting Appellant's argument that it was actually filed July 5, it would still be
25 untimely. *See* Opp. at 11.

26 ² Appellant's notice of appeal asserts that he is also appealing the Bankruptcy Court's June
27 13, 2011 order denying a motion to appeal in forma pauperis ("IFP") and its June 23, 2011 order
28 regarding petitioning creditors' disruptions of the clerk's office. *See* Docket No. 1. However, the
June 13 order does not apply to Appellant as he is not named in the order as an applicant for IFP
status. *Id.* In addition, the June 23 order merely sets out procedures for petitioners to follow for
future filings with the court and as such does not give rise to an appeal. *See* 28 U.S.C. § 158.

1 *first* timely notice of appeal. *See* 8002(a) (“[A]ny other party may file a notice of appeal within 14
2 days of the date on which the *first* notice of appeal was filed.”) (emphasis added). Thus, once Mr.
3 Stewart filed his notice on June 7, all other potential appellants were required to file their notices by
4 June 21. Mr. De Torres’ notice did not operate to further extend the appeal period.

5 Appellant’s argument that the clock should have restarted upon Mr. Stewart’s filing of an
6 amended notice of appeal on July 7, 2011, *see* Opp. at 14, is also unavailing. Rule 8002 requires an
7 appellant to file his notice of appeal, at the latest, within 14 days of the *first* timely filed notice of
8 appeal. There is no other provision of the rule extending the appeal period by virtue of an amended
9 notice of appeal. *Cf.* 8002(b) (tolling time for appeal for all parties if any party files one of four
10 post-judgment motions with the Bankruptcy court). By the time Mr. Stewart filed his amended
11 notice of appeal, the clock had already run out for Appellant Beaujaya. *See Law Works USA, Inc.*
12 *v. Walton*, No. 10-60731-CIV, 2010 WL 3781387, at *4 (S.D. Fla. Sept. 22, 2010) (rejecting
13 appellants’ attempt to cure their untimely appeals by amending a timely appellant’s appeal to
14 include their names) (citing *Nocula v. UGS Corp.*, 520 F.3d 719, 721-22 (7th Cir. 2008)). To allow
15 repeated extensions of the time to file an appeal based on one party’s amendments would be contrary
16 to the Ninth Circuit’s mandate that outside certain enumerated exceptions in Rule 8002, “[t]he time
17 provisions in Bankruptcy Rule 8002 are strictly enforced.” *In re Nucorp Energy, Inc.*, 812 F.2d 582,
18 584 (9th Cir. 1987) (quotations omitted).

19 Finally, Appellant’s arguments with respect to the timeliness of notices of appeal filed by
20 other appellants, and whether they were properly served, *see* Opp. at 10-11, 14, are inapposite since
21 the only party to which Appellee’s motion to dismiss applies is Appellant Beaujaya.

22 The only way in which Appellant’s appeal would be timely is if he were granted an
23 extension pursuant to 8002(c), under which the Bankruptcy court has discretion to “extend the time
24 for filing the notice of appeal by any party.” 8002(c)(1). Appellant asserts that he filed such a
25 motion with the Bankruptcy court to extend time to file his notice of appeal. *See* Opp. at 14.
26 Indeed, the docket sheet submitted with Appellant’s Notice of Appeal, Docket No. 1 Exh. 4,
27 indicates that he filed such a motion in the Bankruptcy court on July 5, 2011 at that court’s Docket
28 No. 71. Pursuant to Rule 8002(c)(2), Appellant would have to demonstrate “excusable neglect” in

1 order to warrant an extension from the Bankruptcy court because he filed the motion 14 days after
 2 the time for filing a notice of appeal had already expired. *See* 8002(c)(2) (“A request to extend the
 3 time for filing a notice of appeal must be made by written motion filed before the time for filing a
 4 notice of appeal has expired, except that *such a motion filed not later than 21 days after the*
 5 *expiration of the time for filing a notice of appeal may be granted upon a showing of excusable*
 6 *neglect.*”) (emphasis added).

7 The Bankruptcy court’s docket sheet indicates that the court has never ruled on Appellant
 8 Beaujayam’s motion for an extension. Since the Bankruptcy court has yet to rule on Appellant’s
 9 motion for an extension of time, this Court cannot consider the instant appeal. Only the bankruptcy
 10 court, not the district court or bankruptcy appellate panel, may extend the time for filing the notice
 11 of appeal.” 10 A. Resnick & J. Sommer, *Collier on Bankruptcy* ¶ 8002.09 (16th ed. 2011). If the
 12 Bankruptcy court denies Appellant’s motion, his appeal will be untimely unless he appeals the
 13 denial and can show that the Bankruptcy court’s decision was an abuse of discretion. *See In re*
 14 *Cahn*, 188 B.R. 627, 629 (9th Cir. BAP 1995) (“The bankruptcy court’s denial of a motion for
 15 extension of time to file an appeal is reviewed under an abuse of discretion standard.”). If the
 16 Bankruptcy court grants the motion to extend, Appellant will have 14 days from the entry of that
 17 order to file his notice of appeal in this Court.

18 The fact that Appellant filed a motion to extend the time to file a notice of appeal that
 19 complies with Rule 8002(c)(2) does not, on its own, render his notice of appeal of the underlying
 20 court orders timely. The Tenth Circuit has considered this issue directly and held:

21 “[T]he motion to extend [did not] automatically serve to extend the
 22 appeal time until such time as the bankruptcy court ruled on the
 23 extension motion. In order to qualify as a tolling motion, a pleading
 24 must seek ‘substantive, not merely ministerial or clerical, relief.’
 25 *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 387 (9th Cir. 1988).
 26 Under Fed. R. Bankr. P. 8002(b), specific post-judgment motions act
 27 to toll the running of the time to appeal. As distinguished from
 28 motions to extend, motions that toll the time to appeal under Rule
 8002(b) are those which seek to amend or add to the findings, or to
 alter or amend the judgment or to request a new trial or which seek
 relief from the judgment. *See Rettig v. Peters (In re Peters)*, 191 B.R.
 411, 415 (9th Cir. BAP 1996). A motion for extension of time is
 ministerial and does not qualify as a tolling motion.”

1 *In re Higgins*, 220 B.R. 1022, 1026 (10th Cir. 1998). While the Ninth Circuit does not appear to
2 have expressly decided this issue, *see In re Peters*, 191 B.R. at 420 (“[W]e need not consider
3 whether the appellant’s motion to extend the time for filing her notice of appeal should be construed
4 as a tolling motion.”), the Court finds the Tenth Circuit’s reasoning persuasive. Indeed, as the
5 District of Connecticut has noted with respect to the analogous Federal Rule of Appellate Procedure
6 4(a)(5), finding that the mere filing of a motion to extend the time to file an appeal tolled the time to
7 appeal “would render superfluous the court’s decision on the motion for extension of time to file a
8 notice of appeal.” *Nyack v. S. Conn. State Univ.*, No. 3:03-CV-839 (TPS), 2007 WL 162723, at *2
9 (D. Conn. Jan. 17, 2007). Thus, absent the grant of an extension, Appellant’s appeal is untimely.

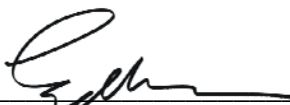
10 Accordingly, pursuant to Civil Local Rule 7–1(b), the Court determines that this matter is
11 appropriate for resolution without oral argument, and VACATES the hearing. The Court hereby
12 **REMANDS** this action to the Bankruptcy court pending its ruling on Appellant’s motion for an
13 extension of time to file a notice of appeal.

14 The Court also **GRANTS** Appellee’s Request for Judicial Notice of the docket reports in the
15 Bankruptcy Court and related appeals in this Court, Docket No. 4. *See* Fed. R. Evid. 201. As for
16 Appellant’s Request for Judicial Notice, Docket No. 8, the Court **GRANTS** the request as to
17 Exhibits 6 and 7, the Bankruptcy court’s orders. The Court **DENIES** Appellant’s other requests as
18 moot.

19 This order disposes of Docket No. 3.

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21 IT IS SO ORDERED.

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23 Dated: October 4, 2011

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26 EDWARD M. CHEN
27 United States District Judge
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